

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of Stop and Save Food
Market

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

This matter was heard by Administrative Law Judge Beverly Jones Heydinger, commencing at 9:30 a.m., March 22, 2000 at the Office of Administrative Hearings. The hearing was held pursuant to a Notice of and Order for Hearing dated March 7, 2000. Jennifer L. Beens, Assistant Attorney General, Suite 1200, NCL Tower, 445 Minnesota Street, St. Paul, MN 55101 appeared for the Department of Health. Mr. Mohamed Al-Khatib, 3345 Nicollet Avenue South, Minneapolis, MN 55408, owner, appeared on behalf of the Stop and Save Food Market. The record closed at the completion of the hearing on March 22, 2000. It was reopened on April 20 and closed on May 2, 2000 to allow additional affidavits from the parties.

NOTICE

This Report is a recommendation, not a final decision. The Commissioner of Health will make the final decision after a review of the record and may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendation. Parties should contact Jan Malcolm, Department of Health, 85 East 7th Place, Suite 400, St. Paul, MN 55101, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

Did Stop and Save Food Market deposit WIC vouchers to its account that were redeemed by investigators at another store, in violation of Minn. R. 4617.0086, subp. 3(H)(1997)?

Did the Department consider the possible hardship to program participants prior to disqualifying Stop and Save Food Market from the WIC program?

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Stop and Save Food Market ("Stop and Save") is a retail food store located at 3345 Nicollet Ave. South, Minneapolis, Minnesota. It is a vendor in the Women, Infants and Children ("WIC") nutrition program administered by the Minnesota Department of Health.^[1] Persons who are eligible for WIC receive food and nutrition services, including vouchers that may be exchanged for certain foods, based on their nutritional needs, and approved by the WIC program. A WIC vendor is a retail food

store or pharmacy authorized to accept WIC vouchers in exchange for the food items specified on the voucher.^[2]

2. When the Department certifies a retail food store or pharmacy to participate as a vendor in the WIC program, it issues it a vendor number, and a stamp with that number. Each participating vendor has a unique vendor number and stamp.^[3] The Department issued Stop and Save vendor number 0071 and the corresponding stamp.^[4]

3. Each WIC participant has an identification folder. Each folder lists the name of the person eligible for WIC and the names of “proxies” – persons, usually family members, who may exchange the vouchers for food on behalf of the eligible person. The certified person and each proxy must sign the identification folder. Each voucher is issued in the name of the eligible person. The retail food store cashier who accepts the voucher must ask the purchaser to sign the voucher, and must compare the signature on the voucher with a name and signature on the identification folder.^[5]

4. Market Express is a retail food store located at 3159 Chicago Ave. South, Minneapolis, Minnesota. It participated as a vendor in the WIC program until it was disqualified from the program for three years, effective April 29, 1998. Among the violations that led to the disqualification were: providing unauthorized items to the WIC investigator in exchange for the WIC voucher; failing to enter a dollar amount of the purchase on the WIC voucher at the time the voucher was exchanged; and failing to verify that the WIC customer’s signature matched the signature on the WIC identification folder.^[6]

5. After Market Express was disqualified from the WIC program, undercover investigators^[7] under contract to the Department of Health visited Market Express and, posing as WIC customers, attempted to redeem WIC vouchers for food. On five occasions, October 20, October 27, October 30, November 9 and November 18, 1999, an undercover investigator obtained food in exchange for a voucher. In each case, the undercover investigator signed the WIC voucher, and in each instance, Market Express did not fill in the price of the purchased goods on the WIC voucher in the presence of the investigator. In four of the five instances, the cashier allowed the investigator to use the voucher for unauthorized purchases.^[8]

6. The five vouchers redeemed at Market Express by the undercover investigators on the dates set forth in Findings of Fact No. 5 were endorsed by Stop and Save, stamped with its vendor stamp, and deposited in its bank account. At the time of deposit, each voucher had a price filled in. Three vouchers were deposited on November 2, 1999, and one each on November 17 and 23.^[9] Payments to Stop and Save for each of the five vouchers were cleared through the Premier Bank in Marietta, Georgia, which processes Minnesota WIC vouchers.^[10]

7. The owner of Shop and Save, Mr. Mohamed Al-Khatib, admitted that the vouchers were deposited in his account, but denied receiving them from Market Express, or agreeing to accept payment for Market Express through the Stop and Save account.^[11]

8. On each of the five occasions set forth in paragraph 5, the investigator signed the voucher in the presence of the cashier at Market Express. Those signatures appeared on the vouchers after they cleared the bank, just as written at Market Express. The investigators did not lose their identification folders or leave them at Market Express.^[12]

9. Mr. Al-Khatib could not explain how the vouchers exchanged at Market Express ended up in his account. He speculated that some person brought the signed vouchers to his store and made up an identification folder to match. In order to match all the vouchers deposited by Stop and Save, at least three different identifications folders would have been forged. Although Mr. Al-Khatib's wife, Rema Al Khatib, was not present to testify, in her affidavit she admitted that she accepted vouchers that were signed if the signature on the voucher matched the signature on the identification folder. Mr. Al-Khatib had no other evidence to support his theory.

10. After Mr. Al-Khatib received notice of disqualification from the Department, he attempted to speak to the owner of Market Express but was turned away.^[13]

11. On January 24, 2000, after Stop and Save received notice of its disqualification, a Department investigator attempted to use a voucher at Market Express, but was told by the cashier that Market Express was no longer participating in the WIC program.^[14]

12. The Department did three compliance buys at Stop and Save, but there were no violations of the Department's rules during those buys.^[15]

13. The Department submitted an affidavit from Rick Chiat stating that disqualification of Stop and Save would present no hardship to the participants in the WIC program. Attached were minutes from the January 14, 2000 Vendor Violation Forum. The minutes reflect that the Department considered hardship to participants in its decision to disqualify Stop and Save.^[16]

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Department of Health and the Administrative Law Judge have jurisdiction in this matter.^[17]

2. The Department gave proper notice of this hearing and has complied with all relevant substantive and procedural requirements of statute.

3. The Department has the burden of proving by a preponderance of the evidence that the alleged violations occurred, and that disqualification will not create undue hardship for participants.

4. No vendor may accept or redeem a voucher from any source other than a WIC customer.^[18] Stop and Save violated this rule and §III.D. of its vendor agreement on five occasions. These are Class "A" violations.^[19]

5. Prior to disqualifying a food vendor, the State agency must consider whether the disqualification would create undue hardships for participants.^[20] The Department has done so and determined that disqualification would not result in participant hardship.

6. The federal regulations require that a disqualification "shall be a reasonable period of time, not to exceed three years. The maximum period of disqualification shall be imposed only for serious or repeated Program abuse."^[21]

7. This report is subject to review by the Commissioner of Health; it is not the final disposition.

8. Any Findings of Fact that are more appropriately described as Conclusions are adopted as Conclusions.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: that the Department's decision to disqualify Stop and Save Market be AFFIRMED.

The Protective Order issued in this case on March 15, 2000, protecting the identities of the undercover investigators for the Department shall remain in effect.

Dated this ____ day of May, 2000.

BEVERLY JONES HEYDINGER
Administrative Law Judge

Reported: Tape-recorded (two tapes)

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the Department is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

The Department must demonstrate by a preponderance of the evidence that there were violations of the statutes or rules governing WIC vendors, and that, if violations occurred, disqualification from the program would not create a hardship for the participants in the WIC program. The Department has met its burden of showing that the violations occurred, and that it considered the hardship to the participants in reaching its decision to disqualify Stop and Save.

There was uncontroverted evidence that the investigators took the WIC vouchers to Market Express, signed them, and exchanged them for food. The same vouchers were deposited by Stop and Save in its bank account. Stop and Save had no evidence that any person presented the vouchers for food at Stop and Save, or that it exchanged the vouchers for food. Thus, the most logical conclusion from the facts is that Stop and Save deposited vouchers for Market Express.

Stop and Save offered its hypothesis: that someone had presented the vouchers at its store, along with matching phony identification folders. But it had no evidence to directly support that hypothesis, or indicate why Market Express, would have attempted to pass off all of the forged documents at one store. It is apparent that Market Express has a bad record with WIC. It is possible that it had an interest in accepting WIC vouchers after its disqualification and running some kind of scam on Stop and Save. Mr. Marsh-Lott testified about the efforts taken to assure that each WIC identification folder is properly issued, and that blank folders or folders that could be altered are secured. Although it is possible that three or more folders fell into the wrong hands and were forged to match the vouchers turned in by the investigators to Market Express, there was no evidence that it happened. The evidence better supports the Department's position that Stop and Save redeemed the vouchers for Market Express, thus violating its agreement with the WIC program and the Department's rules.

The federal regulations do require that the State agency consider "whether the disqualification would create undue hardships for participants."^[22] Neither party addressed the issue at the hearing. They were directed to address the issue post-hearing. The Department supplied an Affidavit of Rick Chiat with minutes from the meeting where the Department decided to disqualify Stop and Save. The minutes reflect that hardship to participants was considered. A map of stores in the vicinity of Lake and Grand was also attached. Stop and Save did not submit any evidence that disqualification would be a hardship to program participants.

The Department asserts that it is required to disqualify Stop and Save for three years because there was more than one violation of the WIC rules. However, the federal regulations permit the State to disqualify for this period, but do not clearly require it in every case. They provide that the disqualification period set by the State "shall be a reasonable period of time, not to exceed three years. The maximum period of disqualification shall be imposed only for serious or repeated Program abuse."^[23] The Department's rule incorporates that flexibility. It states: (t)he commissioner shall disqualify the vendor for the maximum period authorized in Code of Federal

Regulations, title 7, section 246.12 (k)(1)(ii), as amended.” Thus the maximum is a period “not to exceed” three years.

In addition it is well-established that the term “shall” in this context is not mandatory, but should be interpreted to accomplish the rule’s intended purpose.^[24] In determining the appropriate sanction, it is reasonable to consider the weight of the evidence, Stop and Save’s past compliance, and the history of problems with Market Express.

In contrast to the compliance problems at Market Express, there have not been WIC violations during compliance buys at Stop and Save. This lends some support to Stop and Save’s defense and creates some doubt about the Department’s position. It would be appropriate to take these facts into account when determining the appropriate sanction.^[25]

May 9, 2000

RE:

Dear

B.J.H.

^[1] Ex. 2.

^[2] Test. of Rick Chiat.

^[3] Minn. Rules 4617.0070, subp. 1 (1997); Test. of R. Chiat.

^[4] Test. of R. Chiat.

^[5] Test. of F. Marsh-Lott; Ex. 19.

^[6] Ex. 3.

^[7] The identities of the undercover investigators were disclosed to Stop and Save, but are covered by a Protective Order issued March 15, 2000.

^[8] Test. of S.V., K.H. and F. Marsh-Lott; Exs. 4-8.

^[9] Exs. 14-18.

^[10] Test. of F. Marsh-Lott; Ex. 13.

^[11] Test. of M. Al-Khatib.

^[12] Testimony of S. V., K.H., F. Marsh-Lott; Ex. 14 – 18.

^[13] Test. of M. Al -Khatib.

^[14] Test. of K.H. and F. Marsh-Lott.

^[15] Test. of F. Marsh-Lott; Exs.20-22.

^[16] Affidavit of R. Chiat.

^[17] Minn. Stat. § 14.55 (1998).

^[18] Minn. Rules pt. 4617.0086, subp.3H.

^[19] *Id.* and Ex. 2.

^[20] 7 C.F.R. §246.12 (k)(1)(v).

^[21] 7 C.F.R. §246.12 (k)(1)(ii).

^[22] 7 C.F.R. §246.12 (k)(1)(v).

^[23] 7 C.F.R. §246.12(k)(1)(ii).

^[24] *State v. James*, 234 Minn. 438, 48 N.W.2d 662(1951).

^[25] After the notice of disqualification was sent to Stop and Save, an investigator who attempted to redeem a voucher at Market Express was told by the cashier that Market Express was no longer participating in WIC. Mr. Al-Khatib also went to Market Express after receiving the notice of disqualification and attempted to speak to the owner, but was turned away. Thus, the reason for the change in practice at Market Express is not clear, and does not lend support to either party's position.